

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Respondent,

v.

FROYLAN CONTRERAS,

Petitioner.

No. CR-07-6036-FVS

ORDER DENYING PETITIONER'S
MOTION TO VACATE JUDGMENT
PURSUANT TO RULE 36, IN PARI
MATERIA TO RULE 60(b),
CONSTRUED AS A REQUEST FOR A
CERTIFICATE OF APPEALABILITY

THIS MATTER comes before the Court on Petitioner's motion to vacate judgment pursuant to Rule 36, in pari materia to Rule 60(b). (Ct. Rec. 130). Petitioner is proceeding pro se.

BACKGROUND

The Court sentenced Petitioner, on June 17, 2008, to a term of 151 months imprisonment following his entry of a guilty plea to the offense of possession of a controlled substance (methamphetamine) with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Judgment was entered on June 20, 2008, and Petitioner appealed his sentence on June 25, 2008. On November 2, 2009, the Ninth Circuit issued its mandate affirming the District Court's decision. (Ct. Rec. 127).

On February 18, 2011, Petitioner moved to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On March 16, 2011, the Court denied Petitioner's Section 2255 petition finding the petition untimely and the claims raised procedurally defaulted. (Ct.

1 Rec. 129). On June 29, 2011, Petitioner simultaneously filed a notice
2 of appeal and the instant motion "to vacate judgment." (Ct. Rec. 130
3 & 131). Petitioner's motion "to vacate judgment" (Ct. Rec. 130) is
4 construed as a request for the issuance of a certificate of
5 appealability.

6 **DISCUSSION**

7 Petitioner's motion specifically requests that the Court "issue a
8 Certificate of Appealability so that the issues can be adjudicated on
9 the merits." (Ct. Rec. 130 at 9).

10 In order to pursue any appeal from the denial or dismissal for
11 writ of habeas corpus brought by a federal prisoner under Section
12 2255, a petitioner must first obtain a certificate of appealability.
13 28 U.S.C. § 2253(c). "Unless a circuit justice or judge issues a
14 certificate of appealability, an appeal may not be taken to the court
15 of appeals from . . . the final order in a proceeding under section
16 2255." 28 U.S.C. § 2253(c)(1)(B). A district court possesses the
17 authority to issue a certificate of appealability. *United States v.*
18 *Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). The issuance of a
19 certificate of appealability is a jurisdictional prerequisite to
20 appeal. *Gatlin v. M.K. Madding*, 189 F.3d 882, 886 (9th Cir. 1999). A
21 certificate of appealability may issue only if the applicant has made
22 "a substantial showing of the denial of a constitutional right." 28
23 U.S.C. § 2253(c)(2); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir.
24 1999). Under this standard, a petitioner must show that reasonable
25 jurists could debate whether the petition should have been resolved in
26 a different manner or that the issues presented were adequate to
deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537

1 U.S. 322, 335-336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (quoting
2 *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542
3 (2000)).

4 Here, for the reasons set forth in the Court's March 16, 2011
5 order denying Petitioner's Section 2255 petition (Ct. Rec. 129),
6 Petitioner is not able to make a substantial showing of the denial of
7 a constitutional right. The petition was untimely and the claims
8 raised have been procedurally defaulted. These determinations are not
9 debatable among jurists of reason, a court could not resolve the
10 issues in a different manner, and there is no issue of sufficient
11 adequacy to deserve encouragement to proceed further. Because
12 Petitioner has not made a substantial showing of the denial of a
13 constitutional right, the Court declines to issue a certificate of
14 appealability. 28 U.S.C. § 2253(c).

15 The Court being fully advised, **IT IS HEREBY ORDERED** that
16 Defendant's motion to vacate judgment pursuant to Rule 36, in pari
17 materia to Rule 60(b), construed as a request for a certificate of
18 appealability, (Ct. Rec. 130) is **DENIED**.

19 **IT IS SO ORDERED.** The District Court Executive is hereby
20 directed to enter this order and furnish copies to Petitioner and
21 counsel for the government.

22 **DATED** this 30th day of June, 2011.

23 S/Fred Van Sickle
24 Fred Van Sickle
25 Senior United States District Judge
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